Supreme Court of the United States

October Term, 1942.

No. 357.

THE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OPPOSING WRIT OF CERTIORARI.

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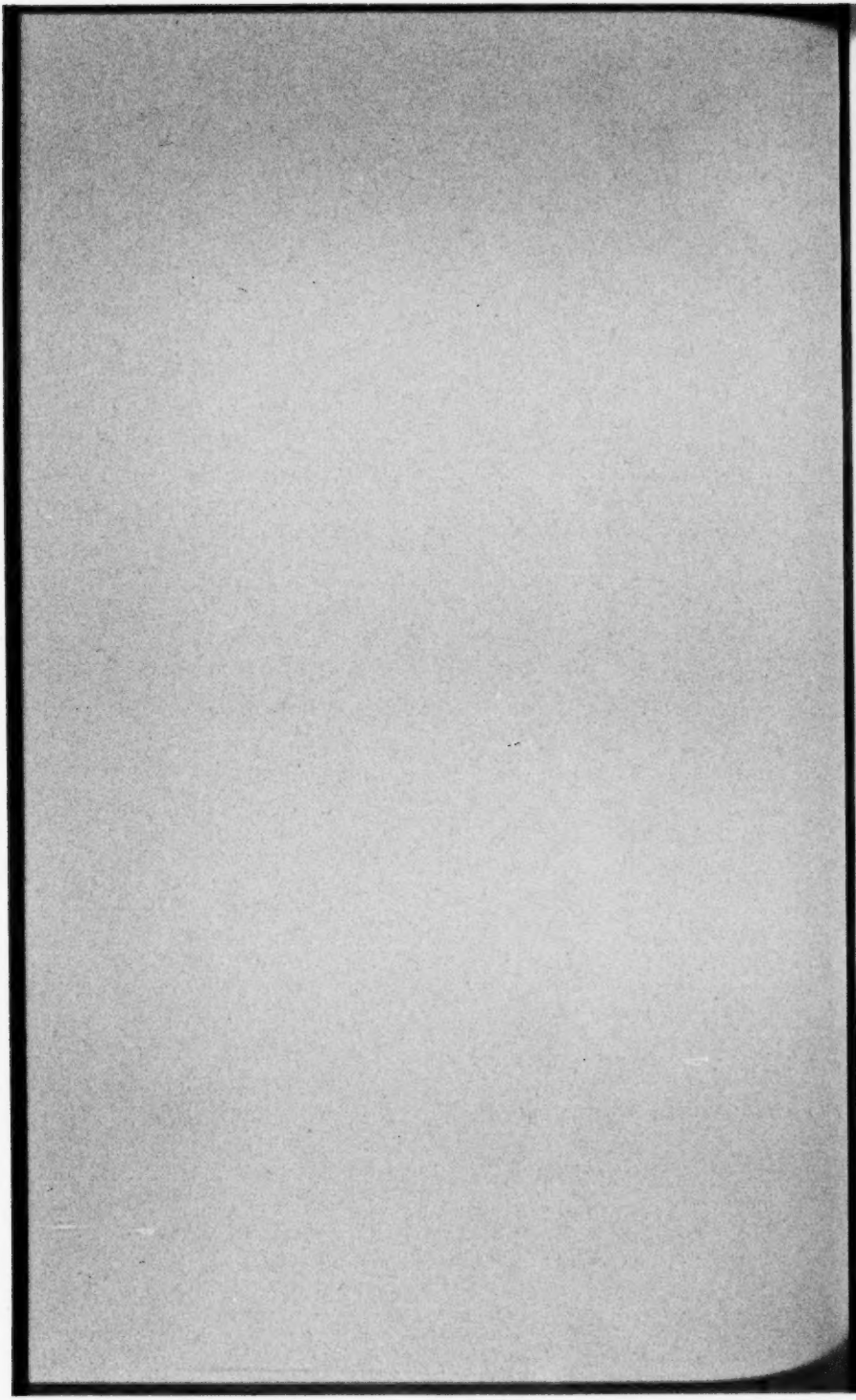

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STATEMENT OF FACTS.

On November 22, 1939, at about 9:30 P. M. (R. 4, 14, 17, 21, 23, 70), at the employer's engine house in Rensselaer (R. 4, 17, 31), claimant, in the course of his regular employment (R. 14, 30), which was that of a boilermaker (R. 4, 14, 16, 24, 31) and boiler inspector (R. 33, 34, 39, 61), was burning rivets off a can of carbon, with the aid of an acetylene torch, when the can exploded, with resultant burns and cuts about claimant's face, forehead and neck, causing the disfigurement for which the awards under review were made (R. 14, 17, 19-20, 26, 31, 58).

Engine No. 5327 (R. 10, 41), hauling northbound train 43 from Harmon (R. 46, 48) with cars in transit interstate (R. 53), had developed a leaking tank by the time it reached Albany, where it was cut out of the train and sent to the Rensselaer roundhouse, arriving there about

5:30 A. M. on the morning of November 22, 1939 (R. 48). Claimant, whose tour of duty was from 4 P. M. until midnight (R. 34, 38), finding Engine 5327 with its fires drawn and water drained (R. 4, 11, 15, 31, 32, 70), at once went to work upon the necessary repairs, which consisted of applying a *patch* to the leaking tank (R. 31-32, 49), and continued at work until he met with his accident at about 9:30 that evening (R. 32). After the accident, claimant went to a doctor but returned to the engine house where he stayed until his quitting hour of midnight without loss of time (R. 17, 20, 32, 44), having worked only on that engine that day (R. 38, 40, 70). At 1 A. M. on the morning of November 23, 1939, the engine, with repairs completed and its fires up, left the engine house less than twenty hours after its arrival there, under assignment to haul from Albany to Harmon (R. 47-48), train 82, which contained cars in transit from Toronto, Canada, to New York City (R. 54-55).

Working as a *boilermaker* five days a week, claimant did all kinds of general repairs in the line of boiler work on engines, including both quarterly inspections and running repairs, "first on one then on the other" (R. 34). While the greater part of claimant's time was spent on heavy work upon engines out of service for two or three weeks to undergo quarterly repairs (R. 38-39), he also made "running repairs" to any engine coming in off the road to the Rensselaer engine house for work which must be done before it went out again on another train (R. 36). Accordingly as the running repairs took from a couple of hours to eight hours, claimant might work in one day on one engine or up to half a dozen (R. 37). All through the day claimant was subject to interruption in his work on a given engine for an emergency job on another (R. 38). Whether doing heavy work or running repairs, claimant's task involved engines of all kinds—passenger, freight and switch (R. 35-38), there being at times as

many as thirty engines in and around the Rensselaer engine house (R. 42), some of which were devoted to hauling trains between Albany and Boston, Massachusetts, and others between Albany and Weehawken, New Jersey (R. 42-44).

Thus, because he was frequently called upon to make running repairs to such engines (R. 34), clearly involving duties in furtherance of or directly or closely and substantially affecting interstate transportation, his task as a boilermaker was marked by that constantly recurring transition between interstate and intrastate work which the petition (p. 3) and petitioner's brief (pp. 17, 21) stoutly maintain is essential to bring a case within the purview of the amendment (Point II, Subd. 1, p. 6, *post.*).

Working as a *boiler inspector* one day a week, as well as whenever the regular inspector was off (R. 33-34, 39, 63), claimant's task in this capacity involved, among others, Boston & Albany engines, all stipulated as operating between points in Massachusetts and points in New York (R. 66, 67). On each of the following days during the fortnight preceding his accident claimant, as a boiler inspector (R. 63), had worked on at least four engines between their arrival in Albany (R. 66) from Massachusetts and their departure a few hours later on their return trips into that state:

On Nov. 6, Engines 619, 608, 601, 606 (R. 63, 65-66).

On Nov. 11, Engines 601, 607, 615, 503 (R. 63-64, 67).

On Nov. 15, Engines 615, 602, 605, 619 (R. 64, 67).

On Nov. 19, Engines 602, 603, 615, 583 (R. 64), a date omitted from those listed on page 3 of the petition herein.

On Nov. 20, Engines 610, 615, 577, 603 (R. 64, 67).

QUESTION:

Is claimant's case covered by the Federal Employers' Liability Act?

To assert, as at pages 17 and 20 of the petitioner's brief herein, that the railroad, in classifying Wright's task as Federal, relies solely upon his employment as a boiler inspector during one day of each week is utterly to misconceive the railroad's contentions, which are:

Point I (*infra*)—Regardless of the 1939 amendment, Wright's task when he sustained his injury was Federal.

Point II (p. 6, *post.*)—The 1939 amendment serves but to emphasize the Federal color of Wright's duties.

Both contentions were asserted by the railroad before the Industrial Board (R. 9, 10, 21, 27, 55).

POINT I.

Regardless of the 1939 Amendment, Wright's task when he sustained his injury was Federal.

The petition herein correctly states (p. 2) that "The issue in this proceeding is whether the New York State Workmen's Compensation Law applies to the case or whether the sole remedy is provided by the Federal Employers' Liability Act." But the railroad does not agree with the following statements in petitioner's brief:

> "The claim would not have come under the Federal Employers' Liability Act if it had arisen prior to the 1939 amendment to Section 51 of said Act" (p. 14);
>
> "The scope of this amended statute is the sole issue herein" (p. 16);

"The specific and primary issue herein is whether the claimant's work on one day each week as a boiler inspector of interstate engines brings him within the amended statute" (p. 18);

"The respondent's position is based upon the claimant's change to interstate duties on one day each week" (p. 20).

This Court has taken pains to point out that time is a determinative factor in the classification of upkeep work as Federal or non-Federal. Discussing the circumstances of definite character of the task involved it has said (italics ours):

"Equipment out of use, withdrawn for repairs, may or may not partake of that character according to circumstances, *and among the circumstances is the time taken for repairs—the duration of the withdrawal from use.* Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use, and the return to it, being of varying lengths of time, or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations."

Ind. Acc. Comm. v. Davis, 259 U. S. 182, 187.

In sharp contrast with the engine considered in a case which has been cited many times, the engine involved in the case at bar actually was "interrupted in an interstate haul to be repaired and go on" with its next haul which the petitioner concedes (p. 5) to have been within the Federal Act.

Minneapolis & St. Louis R. R. v. Winters, 242 U. S. 353, 356.

So, too, this Court has classified within the Federal Act the work of one engaged in lubricating, in a roundhouse, an engine that was last used in hauling interstate trains and had not been withdrawn from service, observing:

> "His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it * * *."
>
> *New York Central R. R. Co. v. Marcone,* 281 U. S. 345, 350.

The decision in the case last cited turned upon the fact that "the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run."

> *N. Y., N. H. & H. R. R. Co. v. Bezue,* 284 U. S. 415, 420.

POINT II.

The 1939 Amendment serves but to emphasize the Federal color of Wright's duties.

1. *Twice petitioner's brief insists that Wright's "usual duties" brought him squarely within the terms and purpose of the amendment.*

(a) "The manifest object of Congress in amending the statute was solely to eliminate the first requirement of the *Shanks* rule, that the work being done *at the time of the injury* shall determine jurisdiction" (p. 17);

(b) "The sole purpose was to bring a certain class of employees, those who entered both kinds of commerce in their usual duties, within the Federal Act" (p. 21).

Such contentions are precisely consistent with the averment in the petition (p. 3) that Wright's usual duties involved transition between interstate and intrastate tasks.

IN THE LIGHT OF THESE CONCESSIONS OF ACCORD WITH THE RAILROAD'S CONTENTION, CONCURRENCE OF BOTH PARTIES IN THE APPLICABILITY OF THE AMENDMENT TO THE CASE AT BAR IS CLEARLY ESTABLISHED.

2. *The language of the paragraph added by the amendment to §1 of the Federal Act is unambiguous and comprehensive.*

In terms which petitioner's brief (p. 22) states is nothing more than a statutory recognition of the rule announced in *Shanks v. D., L. & W. R. R. Co.* (239 U. S. 556), it reads (45 U. S. Code, §51):

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carrier by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

Its language was designed to be as broad as possible in its scope, since it applies to "ANY EMPLOYEE," "ANY PART" of whose duties are in furtherance of interstate or foreign commerce; or in "ANY WAY" directly or closely and substantially affect such commerce. To reach any other conclusion, one must interpret the word "duties" as referring only to the particular duties performed by the employee when injured, which would result in nullifying the plain words of the amendment. The only alternative to such a narrow and limited interpretation is a broad and comprehensive one. The railroad contends that the amendment disregards any limitation as to the time when the employee's duties in furtherance of, or in any way directly or closely and substantially affecting, interstate commerce had been or were to be performed; nor would the importance of those duties, as compared with the sum total of all of such employee's duties, be of

the slightest significance. It is immaterial whether or not a member of a switching crew or a car repairer is engaged in work on a car then used in or designated for interstate commerce, the only requirement to bring a case within the amendment being that "ANY PART" of the employee's duties, past, present or future, be in furtherance of, or such as to affect, such commerce in any way, directly or closely and substantially. For Congress, in thus amending Section 1 of the Federal Act, has enacted that such employees "shall be considered as entitled to the benefits of this act."

> "If this mandate is to be changed, it must be changed by Congress and not by the Courts."
>
> *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, 43 (April 6, 1942).

The word "any," occurring three times in the amendment, has in each instance a clear and distinct meaning.

(a) "Any employee" of the class described in the opening words of the amendment means "every employee."

The opening words of Section 5 of the Federal Employers' Liability Act itself, proscribing *"any contract"* designed to exempt a railroad from liability thereunder, have been held to embrace *every* such agreement.

> *Phila., Balt. & Wash. R. R. Co. v. Schubert,* 224 U. S. 603, 613.
>
> *Duncan v. Thompson,* 315 U. S. 1, 5-6 (Jan. 12, 1942).

The provisions of the Merchant Marine Act (46 U. S. C., §688), according to "any seaman" or to his personal representatives a right of action for his personal injury or death, have been held, contrary to the earlier rule which preceded the enactment, to include the master of a vessel.

> *Warner v. Goltra,* 293 U. S. 155, 162.

(b) "Any part of whose duties," as the term is used in the amendment, means some of whose duties; or one or more of whose duties.

Standard Oil Co. v. U. S., 221 U. S. 1, 50, 61.

(c) "In any way," as the term is used in the amendment, means in one way or another.

Stachelberg v. Stachelberg, 121 App. Div. 232, 234; aff'd on opinion below, 192 N. Y. 576.

3. *No substantial question of constitutionality is presented.*

It is too late to question the *power* of Congress to legislate for the protection of railroad workers whose tasks are essential in furtherance of transportation across state lines. This Court has observed in a case under the Federal Employers' Liability Act:

> "no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

Illinois Central R. R. v. Behrens, 233 U. S. 473, 477.

In a case under the Federal Safety Appliance Acts:

> "The scope of the legislation is broad enough to include all employees thus injured, irrespective of the character of the commerce in which they are engaged."

Texas & Pacific Ry. v. Rigsby, 241 U. S. 33, 39.

In a case under the Railway Labor Act:

> "At times a continuous stream of engines and cars passes through the 'back shops' for such repairs * * * The activities in which these employees are engaged have such a relation to the

other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce."

Virginian Ry. v. Federation, 300 U. S. 515, 556.

In a case under the National Labor Relations Act:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

Labor Board v. Jones & Laughlin, 301 U. S. 1, 37.

4. *Recourse to committee reports in Congress is quite unnecessary.*

Not unless the language of a statute is "doubtful or obscure" is resort had to such reports, and then only "to solve doubt and not to create it."

Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, 589.

Here, however, the language is imperative, questionless and certain.

"* * * The words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports."

Standard Co. v. Magrane-Houston Co., 258 U. S. 346, 356.

"Like other extrinsic aids to construction their use is 'to *solve,* but not to *create* an ambiguity'" (italics in original).

U. S. v. Shreveport Grain & Elevator Co., 287 U. S. 77, 83.

> "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."
>
> *U. S. v. Hartwell,* 6 Wall. 385, 396.

Moreover, the minutes of hearings before a subcommittee of the Senate Judiciary Committee, to which petitioner refers at pages 21-22 of its brief, show that pages 3-9 and 73-76 thereof consist largely of statements made to the subcommittee by Mr. T. J. McGrath, while pages 26-29 and 64-66 thereof are made up of statements similarly made by Mr. F. M. Rivinus. Yet statements made *to* committees of Congress are without weight in the interpretation of a statute.

> *McCaughn v. Hershey Chocolate Co.,* 283 U. S. 488, 493-4.

Hence, the most which can be said for the bearing of the committee reports upon this case is "that Congress had opportunity by the reports of its committees, and otherwise" to circumscribe the application of the 1939 amendment, but obviously chose not to do so.

> *U. S. v. Southern Pacific Co.,* 259 U. S. 214, 234.

POINT III.

Certiorari should be denied.

Each of petitioner's arguments in support of the writ is untenable, since none of them presents a substantial Federal question, because:

1. The state courts properly classified Wright's task as Federal, as matter of law.

> *Phila. & Read. Ry. Co. v. Hancock,* 253 U. S. 284, 285.

2. However broad the language of the majority in the Appellate Division in giving its reasons for its decision (R. 82), petitioner is not aggrieved thereby, as it contends at page 6 of its petition and at pages 11, 14, 16 and 23 of its brief, inasmuch as that decision correctly classified Wright's task as Federal, and hence affords no ground for reversal.

3. Nor does the affirmance by the Court of Appeals without opinion (Petition, p. 7; Petitioner's brief, p. 14) signify anything beyond approval of the result in the court below, the effect being much the same as a denial of certiorari by this Court.

Rogers v. Decker, 131 N. Y. 490, 493.
People ex rel. Palmer v. Travis, 223 N. Y. 150, 156.
U. S. v. Carver, 260 U. S. 482, 490.

4. The petition (p. 7) and brief (p. 23) in effect ask this Court to pronounce a declaratory judgment defining the scope of the 1939 amendment; whereas the single question presented is whether, upon its particular facts, *this* claimant's case is governed by the Federal Act, an issue cleared by petitioner's concessions (Point II, subd. 1, p. 6, *ante*).

All of which is respectfully submitted.

Dated, September 25, 1942.

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